

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #20cv5396
UNITED STATES OF AMERICA and :
STATE OF NEW YORK ex rel. PATRICK :
DONOHUE, :
Plaintiffs, :
- against - :
RICHARD CARRANZA, et al., : New York, New York
Defendants. : April 27, 2022
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE STEWART AARON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

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None

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THE COURT: This is Magistrate Judge Aaron.

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This is the matter United States ex rel. Donohue against Carranza, 20cv5396. This line is being recorded.

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Because we have a large number of counsel on the line, I'm going to go down in the order of the caption to take appearances. First of all, who do we have on the line on behalf of the plaintiff?

9

MR. RORY BELLANTONI: Good afternoon, Your Honor, for plaintiffs, Rory Bellantoni, Brain Injury Rights Group.

12

MS. ASHLEY RUSSO: And, Your Honor, Ashley Russo from the Brain Injury Rights Group is on the line as well.

15

THE COURT: All right, who do I have on behalf of Buffalo Public School District, if anyone?

17

(no response)

18

THE COURT: Okay, who do I have on behalf of, well, actually I already heard, before we started the recording, but why doesn't counsel from Katten Muchin enter his appearance please.

22

MR. JOSEPH WILLEY: Okay, this is Joseph Willey from Katten on behalf of the City of New York School District defendants. And I believe I have also Steve Kitzinger from the New York City Law Department. Are you

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5

2 on, Steve?

3 MR. STEPHEN KITZINGER: I am, good afternoon,
4 Your Honor, Stephen Kitzinger at New York City Law
5 Department for the New York City Department of Education
6 defendants.

7 THE COURT: And, Mr. Willey, I note
8 (indiscernible) also identified for the record the other
9 parties you represent please.

10 MR. WILLEY: Yes, Your Honor, we also represent
11 the L.A. County, Los Angeles County School District
12 defendants and the Chicago Public School District
13 defendants. I also have on the line from my firm
14 Alessandra Denis.

15 THE COURT: All right -

16 MS. ALESSANDRA DENIS: Good afternoon --

17 THE COURT: Yes, good afternoon.

18 MS. DENIS: Good afternoon, Your Honor.

19 THE COURT: Good afternoon. And who do I have
20 on behalf of the Stamford Public School District?

21 MR. RYAN DRISCOLL: Good afternoon, Your Honor,
22 Ryan Driscoll from Berchem Moses in Milford, Connecticut.

23 THE COURT: Okay. And who do I have on behalf
24 of Wainscoll County.

25 MR. JOHN DARMINIO: Good afternoon, Your Honor,

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2 John Darminio, Wood Smith Henning & Berman for the Wade
3 County defendants.

4 THE COURT: Okay, and although I'm not sure
5 anyone as yet appeared as counsel of record on behalf of
6 the San Diego Unified School District, is anyone on on
7 their behalf?

8 MR. ENRIQUE VASSALLO: Yes, Your Honor --

9 MS. WHITNEY ANTRIM: Yes, Your Honor.

10 MR. VASSALLO: It's Enrique Vassallo from Orbach
11 Huff Suarez & Henderson. We represent the San Diego
12 Unified School District as well as Lamont Jackson and
13 Cindy Marten, defendants.

14 MS. ANTRIM: And Whitney Antrim also from Orbach
15 Huff & Henderson with the same.

16 THE COURT: Okay, and have you entered notices
17 of appearance yet?

18 MS. ANTRIM: We have not.

19 MR. VASSALLO: I do - we have not, Your Honor.
20 I just submitted my application pro hac vice which was
21 just granted, and we will do that immediately after this
22 call.

23 THE COURT: Okay. And I take it we still don't
24 have anyone who's joined us from the Buffalo Public
25 Schools. I'm just going to ask my law clerk. Could you

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2 just step out and lop a call into this person? I know
3 that we're not technically discussing a matter before
4 them, but since they're counsel of record, why don't we
5 try to get them on the line. Okay?

6 All right, so the way I wanted to start out was
7 to make some observations generally, and then I do want
8 to hear from the parties and, you know, I'll do it in the
9 order that I received the letters. So I'll hear from Mr.
10 Willey first, then I'll hear from the other defense
11 counsel, then, of course, I'll hear from plaintiffs'
12 counsel.

13 So what the law is with respect to my
14 consideration of the merits in making a recommendation to
15 Judge Woods is that unless the court has personal
16 jurisdiction over defendants, generally speaking, a court
17 doesn't rule on the merits of the case. And that's, as
18 you may be aware, a case out of the United States Supreme
19 Court called *Sinochem International against Malaysia*
20 *International Shipping*, 549 U.S. 422, decided in 2007.
21 There is an exception where there are defendants who can
22 test personal jurisdiction but others do not, and it's
23 kind of a practical one, right, where if one must
24 inevitably resolve the merits, it can be done not only
25 for one but for others.

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2 The fly in the ointment here, it seems to me, is
3 that there not only are claims under federal rule but
4 there also are claims asserted under state law with
5 respect to the parties who submitted letters. So, by way
6 of example, California statute, and what I understand to
7 be a unique issue at the California perhaps, regarding
8 the issue of whether or not California school districts
9 are considered arms of the state.

10

 So I have reluctance, I guess would be the word
11 that I'll use, to rule on the merits with respect to
12 defendants over whom the Court lacks personal
13 jurisdiction if there are unique legal claims as to those
14 defendants because those claims perhaps should be
15 determined by a court that has jurisdiction and by a
16 venue where a venue is proper. So, for example, in the
17 case of California defendants, in California.

18

 Another observation I'd like to make is that the
19 briefing so far, there's a motion that was already made
20 by the Wade County defendants. Everyone is focusing on
21 the context that exists with the State of New York, and I
22 alluded to this in footnote 4 of my prior opinion which,
23 as we know, dealt with yet a different set of defendants,
24 what I refer to as the Loudon County defendants, and that
25 is whether in circumstances where there's a federal

2 statute that provides for nationwide service of process,
3 whether or not the proper analysis is under the
4 Fourteenth Amendment of contacts with the State of New
5 York or under the Fifth Amendment looking at contacts
6 with the United State writ large. And as I was preparing
7 for this call, I reminded myself that there's a case out
8 there that I don't believe I cited in my footnote, but
9 it's a case by Judge Castel - let me see if I can find it
10 here.

11 I'm not exactly sure what I did with the case by
12 Judge Castel, but it's also in footnote 4, and it arises
13 in the context of the false claims act where he found --
14 admittedly in that case it was a case involving a
15 defendant out of the United Kingdom, but I think the
16 analysis - oh, here it is. Apologies. *United States ex*
17 *rel. Tzak, T-Z-A-K, against Christian Aid, 2021 W.L.*
18 2354985, and he cites a case called *Marriosh*, which is
19 one that I cite in footnote 4 of my prior opinion. And
20 I'll just read like an excerpt, "When a civil case arises
21 under federal law and a federal statute authorizes
22 nationwide service of process, the relevant contacts for
23 determining personal jurisdictions or contacts with the
24 United States as a whole." And that's what satisfies the
25 Fifth Amendment's due process inquiry.

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2 So obviously if one looks at personal
3 jurisdiction from the perspective of contacts with the
4 United States, any school district located anywhere in
5 the United States theoretically there's personal
6 jurisdiction over it if that's the right analysis.

7 Having said all of that, I am happy to have the
8 defendants brief whatever issues they want to brief. In
9 other words, if Katten on behalf of its clients wishes to
10 seek to convince me that, notwithstanding the lack of
11 personal jurisdiction if that's their position, that
12 there is no personal jurisdiction, and notwithstanding
13 the lack of venue, I should make recommendations to Judge
14 Woods regarding the merits, make that argument. And
15 given that I'm doing a report and recommendation as
16 opposed to ruling on the motion myself, as I did because
17 the parties consented to it in the prior one, it may be
18 that I feel I have to deal with all of the issues that
19 are put before me. But I am concerned about, as I said,
20 the fact that there may be unique state law issues that
21 are more appropriately determined by a district court
22 sitting in a state whose law is being applied.

23 So with that, I'll turn the floor over to you,
24 Mr. Willey, to make whatever remarks you wish to make,
25 and then as I mentioned, I'll go around the horn.

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2 MR. WILLEY: Okay, great. Thank you, Your
3 Honor. So when we requested this conference, I know this
4 conference is not required by your rules, but we
5 requested it because we believe that a conference with
6 the parties and the Court might obviate the need for a
7 motion to dismiss or at least to narrow the issues. It
8 seemed that there was some relevant agency, federal and
9 state agency guidance applying the applicable Medicaid
10 and IDEA laws and regulations that had not been reflected
11 in the complaint and perhaps that overlooked that we
12 thought were right on point and that should be considered
13 here early on.

14

So the core allegations in the Relator's second
15 amended complaint are that essentially that school
16 districts submitted Medicaid claims and received IDEA
17 funding for related health services furnished to school
18 children remotely during the COVID pandemic when schools
19 were closed. That's one of the allegations, that they
20 were not allowed to bill and receive funding for remote
21 services.

22

Secondly, the second core allegation is that if
23 there were to be remote services during school closures,
24 the individual education plans or programs, the IEP's,
25 that the documents required by the IDEA to specify the

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2 related health services each child is to receive, that
3 those IEP's needed to be amended to reflect that the
4 services were being provided remotely rather than in
5 person.

6 And the third core allegation is that the school
7 districts, if they billed Medicaid for services provided
8 remotely, they should have done so at lower rates than
9 the Medicaid rates that the state Medicaid agencies have
10 established for in-person services.

11 So we believe that these allegations that are in
12 the complaint are not viable, and they should not be
13 pursued because the relevant federal and state agencies
14 that administer these programs, the Medicaid program and
15 the IDEA, have issued clear guidance to schools that
16 schools may provide the services remotely during school
17 closures as a result of the pandemic. And that the
18 students IEP's did not need to be amended to reflect the
19 services would be provided remotely and that the schools
20 should bill Medicaid at the regular Medicaid rates for
21 these services.

22 So each of the core allegations in the complaint
23 have been addressed by the agencies and they have
24 permitted the school districts to provide the services in
25 the way that they are alleged to have provided these

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2 services in the complaint. In other words, the very
3 conduct that the complaint alleges is unlawful is, in
4 fact, fully consistent with the Medicaid and IDEA
5 requirements. So the claims at issue cannot possibly be
6 said to be false when furnished and billed exactly as the
7 program required.

8

So there are other bases for dismissal as noted
9 in my April 12 letter, you know, at least as to the
10 California school districts, as you alluded to, Your
11 Honor, there is Ninth Circuit authority that school
12 districts are arms of the state and are not subject to
13 suit under the Federal False Claims Act. So it seems to
14 us that the allegations in the complaint as to the
15 Federal False Claims Act should be withdrawn.

16

There is also case law in the Ninth Circuit that
17 the school districts in California are not subject to
18 suit under the state false claims act, the California
19 False Claims Act. And there's, you know, as in New York,
20 in New York the state false claims act statute on its
21 face provides that school districts in New York are not
22 subject to suit under the state false claims act.

23

So I understand Your Honor's observations about
24 the state false claims acts in the various states. Those
25 statutes - I guess at this point I will just make an

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2 additional observation that the state false claims acts
3 are by and large I think patterned on and designed to,
4 are designed to mirror the federal false claims act, and
5 there are certain reasons why state legislatures have
6 enacted state false claims acts to essentially mirror the
7 federal false claims act. I don't believe that the
8 complaint makes allegations that are unique to the
9 various state false claims acts. It may be that relator
10 alleges that the same conduct would violate both the
11 federal and state false claims acts, but I think that's
12 because the statutes are essentially the same in that
13 regard. So there are not specific allegations that the
14 conduct alleged violates one or the other.

15 Whether we will argue to Your Honor that to make
16 a recommendation to Judge Woods that you decide the case
17 on the merits as to Los Angeles and Chicago school
18 districts, I don't think we're there yet where we've made
19 that decision. But at the very least we would submit
20 that Your Honor should consider the approach taken by the
21 district court in the *Taconic Hills* case which I know
22 Your Honor cited in your decision as to the Loudon,
23 Virginia defendants, which is to decline to transfer the
24 case in the interests of justice if you determine the
25 venue is not proper. There the district court found that

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2 the allegations against the school districts outside of
3 the Southern District of New York were almost identical
4 to the allegations against the New York City Department
5 of Education. And so in the interests of justice, Judge
6 Crotty decided to not transfer the case to those other
7 districts even though venue may have been proper in those
8 other districts.

9

THE COURT: That was upstate counties, upstate
10 districts, am I right, am I remembering that case
11 correctly?

12

MR. WILLEY: That's correct, Your Honor.

13

THE COURT: Right, not other states.

14

MR. WILLEY: That's correct. So that is a
15 summary of the highlights of the complaint and of our
16 reactions to the complaint that we anticipate being
17 included in a motion to dismiss. You know, there are
18 some other issues, but I believe those are the core
19 issues. And as I said, we thought it may be helpful to
20 bring this to the attention of the Court and to the other
21 parties so that we can decide whether there are claims
22 that might be narrowed or whether the motion might be
23 obviated altogether.

24

We cited some of that agency guidance in my
25 letter of April 12. There's more. But the guidance was

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2 issued by the U.S. Department of Education, the Federal
3 Centers for Medicare and Medicaid Services which govern
4 at the federal level the Medicaid program, and then we
5 cited at least for our clients the guidance issued by the
6 New York State Medicaid agency and state education agency
7 as well as guidance from California and Illinois.

8

THE COURT: All right, so let me ask
9 plaintiffs' counsel - before I turn to other defense
10 counsel, let me ask plaintiffs' counsel, having heard
11 what you heard, are you willing to narrow any of the
12 claims in the case?

13

MR. BELLANTONI: Well, let me - if I may just
14 address that, Judge, (indiscernible). The one claim that
15 can be narrowed, I'm not sure how, I think it is clear,
16 based on what counsel shared with me - I did not realize
17 this until he shared the cases with me that in the State
18 of California, it's pretty clear cut that school
19 districts are not considered persons or the person of a
20 qui tam action, and the district courts use in an
21 Eleventh Amendment analysis to decide whether or not the
22 school districts are arms of the state. The one issue I
23 have, the one place I'm hung up is under the IDEA school
24 districts that accept federal funds waive their Eleventh
25 Amendment protection.

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2 What I have not yet figured out, Your Honor, and
3 I apologize for my inability to do it, is whether or not
4 the analysis by the district courts is using the Eleventh
5 Amendment as an example to determine whether or not the
6 school districts are persons or literally applying the
7 Eleventh Amendment, literally saying because the Eleventh
8 Amendment grants the school districts immunity as arms of
9 the state, then they can't be sued. If that's the case,
10 then they don't have immunity under the IDEA. Medicaid I
11 have not found an answer to that question yet, whether or
12 not the state accept federal funds, if they waive the
13 same protection. But if the courts were using the
14 Eleventh Amendment by way of analysis, then the IDEA may
15 not give the school districts the protection counsel
16 claims they are.

17

 So the question then is if we agree to brief
18 that singular issue to Your Honor, depending on the
19 ruling, we may have to brief (indiscernible)
20 subsequently. So I don't know if that narrows the issues
21 or perhaps created some more work for the Court. Then if
22 this argument were included in a general motion to
23 dismiss, if that makes any sense, Judge.

24

 THE COURT: Okay, so with respect to the main
25 event, for lack of a better term, the federal statutory

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2 claims, you're not persuaded by the argument made and
3 you're not, and I think Mr. Willey used the words
4 withdraw the claims, that that's not something you're
5 inclined to do.

6 MR. BELLANTONI: I would say, Judge, I'm at 85
7 percent. I have not yet discussed with Mr. Willey the
8 exception to the IDEA. If he convinces me the way he
9 convinced me in the first instance that the school
10 districts are not arms of the state, that the Eleventh
11 Amendment exemption or the IDEA is inapplicable with
12 respect to this analysis, I don't think I have any choice
13 but to withdraw the claims.

14 As I said, my only reservation at this point is
15 not a matter of whether I'm willing to or not, I'm just
16 not convinced that the protection that the school
17 districts have under the Eleventh Amendment applies where
18 the statute said they expressly waive that protection
19 under the IDEA. I mean this would just preclude bringing
20 the claim in the first instance. Obviously, there are
21 the other issues that were addressed, you know, for
22 instance, the online learning. Yet there's federal
23 guidance that says students can be taught online. But
24 what was left out, as I'm looking at the question and
25 answer guidance from the Department of Education, it's

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2 March 12 of 2020, online remote learning can be included
3 in a child's IEP if the IEP is created through the normal
4 process, including with consent of the parents.

5 The problem here is not simply the online
6 learning that was done unilaterally, and our position is
7 it was done unilaterally. There's a change in the way
8 the program was being administered, the educational
9 program, that constitutes a change of place and required
10 the very consent that the federal guidance that counsel
11 refers to, that he referenced in the first instance, and
12 that is, again, may an IEP team consider this his
13 learning plan in a child's IEP as a contingency plan, it
14 (indiscernible). And the answer to that is yes, IEP
15 teams may do so, but if an IEP team meets with the
16 parents, parental participation is a component of the
17 IDEA, and the guidance goes on to say that creating this
18 plan ahead of time gives service providers and the
19 parents an opportunity to reach an agreement as to what
20 circumstances would trigger.

21 So I don't know that there's any agreement on
22 that issue, but as I said, the first issue, if Your Honor
23 feels it does narrow the issues and make it easier, I
24 have no issue, no problem, Judge, with briefing this
25 issue whether or not the school districts are arms of the

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2 state and whether or not the Eleventh Amendment analysis
3 is actually an analysis that gives the districts
4 protection under the Eleventh Amendment or that the
5 courts are using that by way of example to illustrate
6 they're not persons. I think, Your Honor, I don't know
7 that this is something that California courts, that's
8 unique to them.

9 I would say early on in New York I think the
10 Second Circuit was of the same opinion. Today, they're
11 not. They do a case-by-case analysis to determine
12 whether school districts are arms of the state. Whether
13 or not a high school or elementary school or even a
14 community college, there's a case out of Westchester,
15 Westchester Community College, because of the unique
16 circumstances was found not to be an arm of the state.
17 There's two different tests the Circuit uses. One is a
18 the two-part test and one is a six-part test.

19 But clearly, again, I would have to concede in
20 the first instance the case law says that the school
21 districts are not arms of the state. The only question
22 then becomes whether or not the exemption under the IDEA
23 makes them fair game for a (indiscernible) suit or not.
24 If briefing that singular issue is narrowly the issue, I
25 have no problem briefing that first to the Court, and if

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2 Your Honor decides that they are arms of the state
3 notwithstanding the Eleventh Amendment protection, that
4 is what it is, and the other arguments need not be
5 briefed.

6 But, again, if Your Honor finds that the school
7 districts are not deserving of amendment protection, that
8 leaves counsel in the position of having to bring another
9 motion, and I don't know if that narrows the issues or
10 makes them more complicated, Judge.

11 THE COURT: Yeah, so from my perspective, we
12 are not having multiple briefing on multiple levels.
13 We're going to do the whole shooting match. So, Mr.
14 Willey, I'll give you a chance to respond. It sounds
15 like plaintiffs' counsel, subject to that one California
16 exception, declines to withdraw his claims. So you're
17 going to file a motion, right?

18 MR. WILLEY: Yes. I mean I would - I know Mr.
19 Bellantoni addressed one of the three core allegations in
20 the complaint that I discussed which ha to do with
21 whether IEP's need to be amended, and I understand he
22 said that the parents have to participate and, that the
23 parents have to participate when an IEP is amended. And
24 I think what the agency guidance was that they do not
25 need to be amended, and, therefore, they do not need to

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2 involve parental consent to remote learning when schools
3 are closed.

4 So there were two other core allegations which
5 is just one where services can be billed to Medicaid when
6 services are provided remotely at all, and then at the
7 rates, what rates. There were numerous allegations
8 throughout the complaint that somehow the school
9 districts were to bill at special rates or lower rates.
0 And even though they didn't cite any state establishment
1 of rates other than regular rates, Mr. Bellantoni didn't
2 address that in his comments. I didn't know whether that
3 was, he just hadn't gotten to it or whether that was
4 purposeful.

15 THE COURT: You know, I'm not sure what purpose
16 it serves, but, Mr. Bellantoni, feel free to respond to
17 those points, since you're going to have to --

18 (interposing)

19 MR. BELLANTONI: Your Honor --

20 | THE COURT: -- a motion to --

21 MR. BELLANTONI: I'll - I'll defer to Ms

22 Rousseau on this issue, Judge. The issue is more than
23 just services, whether they can be billed at a lesser
24 rate. The issue is whether or not services that were
25 claimed and been provided, for instance, physical

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2 therapy, even if the authority exists in the way counsel
3 suggested exists that needs to be billed at a lesser
4 rate, part of the false claims act is you're not
5 providing the service you claim you're providing. You
6 can call physical therapy physical therapy, but if you're
7 not putting hands on a child and delivering a physical
8 therapy session, then I'm not sure why you're billing for
9 physical therapy or occupational therapy if it's being
10 delivered in a different manner.

11

If counsel is representing there were new
12 sections created in Medicaid, for instance, online, so-
13 called physical therapy billed at a lesser rate, that
14 might be a different story. But what I've seen so far is
15 that the complaint also contains allegations that these
16 services, although claimed to have been provide, simply
17 weren't because they simply can't be. And I'll let Ms.
18 Rousseau address that further.

19

MS. ROUSSEAU: Sure. To echo Mr. Bellantoni's
20 point, I believe in the complaint one of the
21 illustrations and probably one of the best is that there
22 was a 15-year-old non-verbal autistic child or young man
23 rather who was receiving speech therapy over the phone,
24 and now if he's autistic non-verbal, he doesn't
25 communicate, you know, speaking; he uses an assistive

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2 communication device. So those discrepancies that we're
3 talking about, if that makes sense, if the illustration
4 gives it, you know, more depth.

5 MR. WILLEY: Yeah, I understand that, and I
6 don't want to - I don't think we should just be arguing
7 the merits of individual cases. I just want to make the
8 broader point that I think the point of this conference
9 is so that we understand each other's position. If the
10 service is on the IEP, identified in the IEP, it is
11 billable to Medicaid if it's provided. Whether the
12 service meets the IDEA, you know, whether all the
13 services that the child receives meets the IDEA
14 requirement that there's a free and appropriate public
15 education, that's not a requirement for Medicaid billing.
16 For Medicaid billing the requirement is that the service
17 be on the IEP and that the service be provided. And the
18 agencies have said those services can be provided in
19 person, or during school closures as a result of the
20 pandemic, they can be provided remotely. And so if those
21 services on the IEP are furnished remotely or in person,
22 they're billable to Medicaid.

23 Whether you might believe that they would be
24 better provided in person even though the schools are
25 closed or whether they should be in person, it doesn't,

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2 that's not really the requirement here, the Medicaid
3 requirement.

4 So I would, you know, I would ask that you
5 consider the Medicaid requirements for billing for
6 related health services. Those requirements do not
7 incorporate the overall requirement in the IDEA that all
8 the services a student receives must be, must satisfy the
9 free and appropriate public education requirement.

10 That's an IDEA requirement.

11 MS. ROUSSEAU: And with all due respect to the
12 Court, I'll just address this briefly because I don't
13 want to argue at this conference. I think that there's
14 a, there might be a disconnect a little bit between what
15 I'm saying and what you're saying. I understand what
16 you're saying, Mr. Willey, but the other aspect of this,
17 and I heard you mention a bunch of different Medicaid
18 guidelines, how it came down from the federal, it goes to
19 the state. The federal guidelines during the COVID
20 closures were that if a provider was going to offer
21 services to a student with special education under the
22 IDEA, they must offer it in a way that they should see
23 that child or it should imitate or mirror an in-person
24 visit.

25 So I know that I gave you a specific example,

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2 but it's children like that, children who were non-verbal
3 getting speech over the phone, who were blind getting,
4 you know, inappropriate services, it's those situations
5 that we're talking about. So, you know, in those
6 respects we're saying that billing for, you know, a
7 service that was not rendered face to face or mirrored an
8 in-person visit was inappropriate and ran afoul of the
9 federal Medicaid guidelines. I hope that that clears
10 that up.

11 MR. WILLEY: Which federal Medicaid guidelines
12 does that run afoul of?

13 MS. ROUSSEAU: I could find it for you --

14 MR. WILLEY: I'm not putting, I'm not trying to
15 put you on the spot, I just, Ms. Rousseau, I just really,
16 I'm having a hard time understanding, you know, you are
17 saying that the services have to meet some requirements
18 that I believe emanate from the IDEA overall whether a
19 student is receiving a free and appropriate public
20 education, but the Medicaid requirements are really just
21 in the service, speech therapy or whatever it is, on the
22 IEP and was that service provided. And, you know,
23 whether you think it was provided in the best way
24 possible, those are the requirements.

25 MS. ROUSSEAU: I think, respectfully, Mr.

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2 Willey, we're just at a disagreement. So I think, you
3 know, perhaps Judge Aaron, and I don't, I know you don't
4 want to do extra briefing, so I'm not sure if I should
5 continue. I don't want to waste the Court's time or
6 anyone else's time that's on the line. I know that
7 there's another attorney that also wanted to speak.

8 THE COURT: Yeah, there's two or three others.
9 But, look, you'll receive the memorandum filed on behalf
10 of the defendants or memoranda. I believe there's
11 already a schedule in place. And obviously if the plans
12 are without merit, you ought to consider withdrawing
13 them. I haven't heard Mr. Willey say that he believes so
14 much in the strength of his position he's going to send
15 you a 21-day notice under Rule 11. If he believes that
16 that's the case, that's certainly his prerogative. And
17 if you don't withdraw it within the 21 days and he's
18 right, there are consequences that flow from that.

19 But I personally have not studied these issues
20 as carefully as the both of you have, but facially, what
21 Mr. Willey is saying makes sense. I can't tell you
22 whether he's right or not because, as I say, I haven't
23 studied it. But we're going to proceed to briefing.

24 Let me ask, because I said I would give an
25 opportunity for others to speak. Let me hear from Mr.

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2 Driscoll if there's anything you would like to add to
3 this discussion.

4 MR. DRISCOLL: Thank you, Your Honor. I think
5 a lot of the substantive issues that the Stamford Board
6 of Ed would intend to raise were just covered here. I
7 think we stand in a similar position, particularly with
8 respect to the applicability of the false claims act
9 given Connecticut law on whether the boards are an entity
10 that is subject to that. I think the remainder Attorney
11 Willey really covered, is probably what the plaintiffs
12 could expect from the Stamford Board of Education, and we
13 would echo all the arguments he made. I don't think I
14 want to take up anyone else's time with that with, you
15 know, repeating what he's already said, but that is in
16 large part what we would be arguing as well.

17 THE COURT: Okay, and I know we had somebody on
18 behalf of the San Diego Unified School District. I
19 didn't know if there's anything you wish to add.

20 MS. ANTRIM: Yes, this is Whitney -

21 MR. VASSALLO: Your Honor --

22 MS. ANTRIM: Oh --

23 MR. VASSALLO: Go ahead, Whitney, go ahead.

24 MS. ANTRIM: This is Whitney Antrim on behalf
25 of San Diego Unified as well as the individuals named as

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2 superintendents at the time. I have two issues I'd like
3 to add. I certainly join all of the issues raised,
4 especially as to the California statute. But we have two
5 issues individual, well, collectively two. To the - and
6 from what I'm hearing, to the extent that we're talking
7 about individual students and their respective IEP's,
8 courts have been very clear that the decision around
9 whether or not a state has been provided has to be
10 decided at the administrative level. And so to the
11 extent that these individuals have not exhausted
12 administrative remedy, I think there is yet another bar
13 to this court hearing this case at this time because
14 those remedies have not been exhausted, and federal
15 courts have been pretty clear that they don't want to be
16 in the business of assessing individual IEP's like the
17 child that Ms. Rousseau described, the autistic non-
18 verbal child receiving state services allegedly over the
19 phone.

20

And so if we're going to be getting into the
21 nitty gritty, as it were, on each and ever one of the
22 children, I think exhaustive administration remedies
23 under IDEA 1415, I think it's 3(i), has to be considered.
24 So that will be one of the additional arguments that
25 we'll be bringing.

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2 But specific to San Diego is that the child
3 whose IEP has been brought at issue has actually settled
4 with the San Diego Unified School District and signed a
5 general release in settlement, and we believe that this
6 is proceeding in a way that the child's family has agreed
7 not to. And understanding it's a (indiscernible), but to
8 the extent that it's based on his IEP and his situation,
9 we think that there's additional issues there.

10 THE COURT: All right, again, I would encourage
11 the plaintiff to consider the arguments made when they
12 receive the memoranda and withdraw claims as appropriate
13 and if appropriate.

14 Was there anyone else before I hear again from
15 the plaintiffs' side, is there anyone else on the defense
16 side who I haven't heard from that would like to be
17 heard?

18 MR. KITZINGER: Yes, Your Honor, Steve
19 Kitzinger from the New York City Law Department.

20 THE COURT: Yes, go ahead.

21 MR. KITZINGER: I just wanted to bring back
22 around to an issue that Mr. Willey raised but was not
23 responded to, and that is the state false claims act
24 claims where the statute, for example, the New York State
25 and New York City false claims act statutes exclusively

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2 exclude the City of New York and a claim by the City as
3 being subject to those statutes. And I think regardless
4 of the merits or lack of merit of the federal false
5 claims act claims asserted against the City by relator,
6 it really can't be challenged that he cannot bring claims
7 successfully under the state and local false claims act
8 statutes against the City of New York defendants at a
9 minimum.

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And I think even if we can't narrow the big
issues, maybe we can save a few pages and a little ache
on the narrower issues.

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THE COURT: Okay, plaintiffs, do you agree to
withdraw your claims under the state IDEA against the
City of New York?

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MR. KITZINGER: The state STN. Sorry, Your
Honor.

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MR. BELLANTONI: Your Honor, again, I wasn't
involved in drafting this complaint two years ago. When
I was pointed to the authority that says the state or
state entities in New York cannot be named in state false
claims act cases, that appears to be what the statute
says. I don't think that precludes the federal action
for violating the federal false claims act although where
I was in my research was trying to determine if the state

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2 exemption somehow applies to the federal statute. If
3 courts, district courts in New York have said because the
4 state exempts, you know, municipalities and school
5 districts, the school districts are free completely and
6 altogether from false claim cases, I don't believe that
7 to be the case, Judge. To the extent that the state
8 statute precludes these causes of action against school
9 districts like the City of New York, I would just say I
10 don't believe I have any choice but to withdraw that
11 cause of action since that is what the statute says,
12 Judge.

13

THE COURT: Okay, so, Mr. Kitzinger, you'll
14 make the arguments, and it sounds like Mr. Bellantoni
15 will look at them and in his opposition will say we
16 concede, and we agree that these claims should be
17 withdrawn.

18

MR. BELLANTONI: Or, Your Honor, I may even
19 stip those out prior to.

20

THE COURT: Okay.

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MR. BELLANTONI: I'm not prepared to say 100
22 percent right now, but I don't think I need to review his
23 argument. I will review that on my own before the
24 motion's filed, and we'll resolve that issue one way or
25 the other before the motion. I don't think it would be

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2 the right thing for me to do to reserve that argument for
3 motions if I'm convinced that they should be withdrawn.
4 I believe I have an obligation to do that before the
5 motion's filed.

6 THE COURT: All right, so I'll make this
7 comment, and obviously since I'm not presiding, we'll
8 have to get this approved by Judge Woods. But it seems
9 to me, since we're already on to a later iteration of the
10 second amended complaint, as opposed to doing a third
11 amended complaint and thereby mootling the prior motions,
12 I believe that Judge Woods would be amenable to a
13 stipulation agreeing to withdraw this claim or this part
14 of a claim, however it's worded, and to deem the second
15 amended complaint amended by the stip. I can run that by
16 him, but if the parties are amenable to doing that, I
17 propose that we send a letter to me with a proposed
18 stipulation, and I will get Judge Woods's approval to so
19 order it.

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MR. BELLANTONI: That's fine with plaintiffs,

Your Honor.

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THE COURT: Okay. Is there anyone else that

wishes to be heard on this call who hasn't been heard?

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MR. WILLEY: Your Honor, this is Joseph Willey.

If I could just add one point. Your Honor alluded to

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2 Rule 11 as a vehicle to raise some of the points we were
3 discussing. I guess I'd just like to also note that the
4 false claims act itself includes a provision on shifting
5 of attorney's fees when claims are asserted
6 inappropriately. And so I would suggest that we and that
7 the plaintiffs take that into account as well, not just
8 Rule 11, in deciding whether to go forward on a claim
9 where there's specific agency guidance that permits the
10 defendants to provide the services and bill for the
11 services the way they are alleged to have been provided
12 and billed in the complaint.

13 THE COURT: All right, anything else?

14 MR. KITZINGER: Your Honor, this is --

15 (interposing)

16 MR. KITZINGER: I'm sorry, I lost the
17 connection. I am now back. I hope I didn't miss
18 anything.

19 THE COURT: Mr. Willey will fill you in on
20 anything you missed. Who else wanted to speak?

21 MS. ANTRIM: This is Whitney Antrim again,
22 thank you, Your Honor. A question and query about page
23 limits on the motion upcoming, assuming we move forward
24 and file it. Will the Court entertain an oral motion now
25 to grant a few extra pages or would you prefer one in

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2 writing for our brief?

3 THE COURT: How many pages do you want?

4 MS. ANTRIM: I'd like 35 total.

5 THE COURT: Any objection from the plaintiffs'
6 side?

7 MR. BELLANTONI: No, Your Honor.

8 THE COURT: All right, granted.

9 MS. ANTRIM: Thank you so much.

10 THE COURT: All right --

11 MR. BELLANTONI: Your Honor --

12 THE COURT: You have to --

13 MR. BELLANTONI: Would that be generally
14 applicable to all parties or would we have to apply --

15 THE COURT: Yeah, you would get reciprocity.

16 MR. BELLANTONI: Thank you, Judge.

17 MR. WILLEY: Your Honor, we're, as you know, we
18 are representing three major municipals defendants --

19 (interposing)

20 MR. WILLEY: I'm not at this time going to
21 request more than that, and I don't know whether we'll be
22 submitting one single brief or multiple briefs. But my
23 preference I think would be to submit one with just more
24 pages. I think that would be more efficient. But I'm
25 not in a position to request anymore than 35 at this

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2 point, so as long as that's generally applicable, that's
3 fine for now.

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THE COURT: Yeah, it is and hopefully the
5 plaintiff will consent if you're going to have it in a
6 single brief or three different groups to give you more
7 pages. If plaintiff does consent, I will, as long as
8 within reason, approve it.

9

So the schedule that I have is motions by May
10 27, responses by June 27, and replies by July 29. Are we
11 on the same page?

12

MR. BELLANTONI: Yes, Your Honor, for the
13 plaintiffs. Just so everybody's aware, I would never not
14 consent to a request for extra pages or anything of that
15 nature. So if counsel wants to submit something to the
16 Court or request whatever it is now, I can't imagine a
17 circumstance where there would be reasonable objection to
18 a request like that. So I have no problem with counsel,
19 you know, with one brief, even if it exceeds I don't know
20 how many pages, certainly less than 35 times 3, that
21 makes it easier for him and the Court, but, again, I
22 would not object and would consent to any such a request.

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THE COURT: All right. Okay, anything else?
24 All right, I thank the parties, and this matter's
25 adjourned.

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MR. WILLEY: Thank you, Your Honor.

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MS. ANTRIM: Thank you.

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THE COURT: Bye bye.

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(Whereupon the matter is adjourned.)

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C E R T I F I C A T E

3

4 I, Carole Ludwig, certify that the foregoing
5 transcript of proceedings in the United States District
6 Court, Southern District of United States of America and
7 State of New York ex rel. Patrick Donohue versus Richard
8 Carranza, et al., Docket #20cv5396, was prepared using PC-
9 based transcription software and is a true and accurate
10 record of the proceedings.

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Signature

Carole Ludwig

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Carole Ludwig

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Date: May 20, 2022

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